Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

ALONZO MARABLE,

Petitioner,

v.

STATE OF MICHIGAN,

Respondent.

On Petition for Writ of Certiorari to the Michigan Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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65 pp

QUESTIONS PRESENTED FOR REVIEW

I. Have the Michigan appellate courts erred in holding that criminal appellate attorneys (on a criminal defendant's first appeal of right) do not have a duty to raise significant and obvious issues on appeal, particularly where the defendant requests that these issues be raised?

TABLE OF CONTENTS

PAGE NO.

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF CASE 4

REASONS FOR GRANTING WRIT 9

I. THE MICHIGAN APPELLATE COURTS HAVE ERRED IN HOLDING THAT APPELLATE ATTORNEYS DO NOT HAVE A DUTY TO RAISE SIGNIFICANT AND OBVIOUS ISSUES ON APPEAL, PARTICULARLY WHERE THE DEFENDANT REQUESTS THAT THESE ISSUES BE RAISED. 9

RELIEF REQUESTED 16

TABLE OF AUTHORITIES

CASES — PAGE NO.

Clay v. Director, 749 F.2d 427 (7th Cir. 1984), cert. denied, 471 U.S. 1108 (1985) 17

Coleman v. Thompson, 501 U.S. 772 (1991) 18

Crisp v. Ducksworth, 743 F.2d 580 (7th Cir. 1983) 16

Dawan v. Lockhart, 980 F.2d 470 (8th Cir. 1992) 16

Ellis v. Lynaugh, 873 F.2d 830 (5th Cir. 1989) 15

Freeman v. Lane, 962 F.2d 1252 (7th Cir. 1992) 16

Garmon v. Lockhart, 938 F.2d 120 (8th Cir. 1991) 19

Grey v. Greer, 800 F.2d 644 (7th Cir. 1985) 9-10,16

Gray v. Lynn, 6 F.3d 265 (5th Cir. 1993) 16

Haskins v. Lecureux, 16 F.3d 1219 (6th Cir. 1994) 15

Hill v. Lockhart, 877 F.2d 698 (8th Cir. 1989) 19

Hollis v. Davis, 941 F.2d 1471 (11th Cir. 1991), cert denied, 111 S Ct 698 (1991) 17

House v. Balkcom, 725 F.2d 608 (11th Cir. 1984) 16

Houston v. Lockhart, 982 F.2d 1246 (8th Cir. 1993) . . . 17

Jean v. Nelson, 472 U.S. 846 (1985) 20

Jones v. Barnes, 463 U.S. 745 (1983) 10,15,18,19

Kimmelman v. Morrison, 477 U.S. 365 (1986) .. 13,15,16

Kurina v. Thieret, 853 F.2d 1409 (7th Cir. 1988) 16

Landgraf v. United States, ___ U.S. ___, 114 S Ct. 1483 (1994) 20

Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987) 17

Murray v. Carrier, 477 U.S. 478 (1986) 13,19,20

Neally v. Cabana, 764 F.2d 1173 (5th Cir. 1985) 16

Orazio v. Dugger, 876 F.2d 1508 (11th Cir. 1989) 17

People v. Carpentier, 446 Mich. 19, 521 N.W.2d 195 (1994) 3

People v. Fields, 448 Mich. 58, 528 N.W.2d 176 (1995) . 7

People v. Pickens, 446 Mich. 298, 521 N.W.2d 797 (1994) 13

People v Pointer, 133 Mich App 313, 349 NW2d 174 (1984) 7

People v. Reed, 198 Mich. App. 639, 499 N.W.2d 441 (1993) 10

People v. Reed, 449 Mich. 375, 535 N.W.2d 496 (1995) 10,13,19

Ratliff v. United States, 999 F.2d 1023 (6th Cir. 1993) . 16

Risher v. United States, 992 F.2d 982 (9th Cir. 1993) . . 19

Rodriguez v. Young, 906 F.2d 1153 (7th Cir. 1990), cert denied, 111 S Ct 698 (1991) 17

Smith v. Sinai Hospital, 152 Mich. App. 716, 394 N.W.2d (1986) 11

Smith v. South Carolina, 882 F.2d 895 (4th Cir. 1989) cert. denied, 493 US 1046 (1990) 17

Strickland v. Washington, 466 U.S. 668 (1984) 16

Theophelis v. Lansing General Hospital, 148 Mich. App. 564, 384 N.W.2d 823 (1986) 11

United States v. Barbour, 259 U.S. App. DC 111, 813 F.2d 1232 (1987) 16

United States v. DeLaFuente, 8 F.3d 1333 (9th Cir. 1993) 16

United States v. Loughery, 908 F.2d 1014 (D.C. Cir. 1990) 19

Wainwright v. Sykes, 433 U.S. 72 (1977) 18

Zenith Radio Corp. v. United States, 437 U.S. 443 (1978) 20

STATUTES

Mich. Comp. L. §333.7401 7

28 U.S.C. §1257 2

COURT RULES

Mich. Ct. R. 6.500 12

Mich. Ct R. 6.508 7

Mich. S. Ct. Admin. Order 1981-7 18

OTHER

II Liebman, *Federal Habeas Corpus Practice and Procedure*, §26.3b, p. 862-63 18

OPINION BELOW

The opinions of the Michigan Court of Appeals order is unpublished and is reprinted at App. 3a. The order is dated March 27, 1995. The order of the Michigan Supreme Court denying leave to appeal is reprinted at App. 2a and is dated November 29, 1995. The Supreme Court order denying rehearing is dated February 23, 1996 and is reprinted at 1a. The transcript of the trial court opinion granting the Petitioner's motion for relief from judgment is reprinted at 9a.

For reference of the Court, the opinions in the Petitioner's original appeal are also attached. The opinion of the Michigan Court of Appeals affirming the Petitioner's original appeal is attached at 6a. The order of the Michigan Supreme Court (dated December 2, 1992) denying leave to appeal is reprinted at 5a.

JURISDICTION

The decision of the Michigan Supreme Court denying the Petitioner's timely motion for rehearing is dated February 23, 1996. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

US Const Amendment VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

US Const Amendment XIV provides:

> Sect. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

Mich. Ct. R. 6.508 provides in pertinent part:

(B) *Decision Without Evidentiary Hearing.* After reviewing the motion and response, the record, and the expanded record, if any, the court shall determine whether an evidentiary hearing is required. If the court decides that an evidentiary hearing is not required, it may rule on the motion or, in its discretion, afford the parties an opportunity for oral argument.

(C) *Evidentiary Hearing.* If the court decides that an evidentiary hearing is required, it shall schedule and conduct the hearing as promptly as practicable. At the hearing, the rules of evidence other than those with respect to privilege do not apply. The court shall assure that a verbatim record is made of the hearing.

(D) *Entitlement to Relief.* The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;

(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change

in the law has undermined the prior decision;

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

(ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly

unjust to allow the conviction to stand;

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

(iv) in the case of a challenge to the sentence, the sentence is invalid.

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

(E) *Ruling*. The court, either orally or in writing, shall set forth in the record its findings of fact and its conclusions of law, and enter an appropriate order disposing of the motion.

STATEMENT OF CASE

This case originated in the Detroit Recorder's Court, in Detroit, Wayne County, Michigan. There, the Petitioner was successfully prosecuted in a jury trial for delivery of 246 grams of cocaine in violation of Mich. Comp. L. §333.7401(2)(a) (iii). According to this law, Mr. Marable faced a presumptive sentence of twenty to thirty years incarceration. A sentencing court could depart below this presumptive sentence upon a finding of "substantial and compelling circumstances." By judicial interpretation of this statute, Michigan courts have also required the departure factors must be "objectively verifiable."[1] Whether Mr. Marable met this standard is in dispute.

Sentencing took placed on June 29, 1990. At that time the sentencing judge (Judge Michael J. Talbot) sentenced the Defendant to a term of 20 to 30 years incarceration with credit for 23 days. Although defense counsel asked the judge to consider various factors prior to sentencing, the court did not do so. The court ruled that factors such as offender age, lack of record, and work history were "subjective" and therefore not objectively verifiable. The court imposed the presumptive sentence for this offense.

On appeal to the Court of Appeals, Defendant raised the following issues:

I. That the trial court was improperly denied his right to cross-examine a prosecution witness regarding the terms of the plea agreement she received from the prosecution in exchange for her testimony;

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[1]*See People v. Fields*, 448 Mich. 58, 528 NW2d 176 (1995).

II. That the trial court's burden of proof instruction was incorrect;

III. That Judge Talbot was improperly biased in favor of the prosecution;

IV. The prosecution improperly admitted certain evidence at trial;

V. That Petitioner was denied a fair trial based on prosecution misconduct; and,

VI. That the Petitioner was denied his right to effective assistance of counsel.

On June 12, 1992, the Court of Appeals affirmed the Defendant's conviction in a memorandum opinion, (App. 6a). With respect to Issue I, the Court ruled that the Defendant waived the issue by failing to offer any evidence regarding what the penalties were for the original and bargained for charges. Because of this, counsel did not have a proper evidentiary basis from which to argue the penalties to the jury. Dealing with Issue II, the Court ruled that there was no objection to the challenged instruction and the issue was therefore waived. Dealing with Issue III, the Court ruled that the Defendant waived the Issue by failing to move to disqualify the judge. Issue IV was likewise waived by failing to object to the admission of the evidence. The Court also ruled that the prosecutor's closing arguments were proper and that the Defendant was not denied his right to effective assistance of counsel. In sum, the Court ruled that four of the five issues selected by original appellate counsel were procedurally defaulted.

Defendant subsequently moved for relief from judgment in the trial court on October 29, 1993 pursuant to Mich. Ct. R. 6.500 *et seq.* The successor judge found that the original sentence was improper,[2] vacated that sentence and sentenced the Defendant to a term of 5 to 30 years incarceration.

The prosecution appealed by leave granted to the Court of Appeals arguing that the Defendant had failed to establish good cause for post-conviction relief under Mich. Ct. R § 6.508(D)(3), that the factors relied on by the trial judge to grant resentencing were subjective, and that the trial court must apply the abuse of discretion standard of review when reviewing its own sentencing.

On March 27, 1995, the Court of Appeals (Doctoroff, Corrigan, and Kavanagh) reversed in a memorandum decision. The Court ruled that the "Defendant failed to establish good cause for failing to raise his challenge to sentence on prior appeal of right." The Court also ruled that the sentence originally imposed was not an invalid sentence.[3] The Court ordered as a remedy that the original sentence be reimposed. The Court did not provide any mechanism for Mr. Marable to prove good cause for failing to present the issue in the first appeal, (App. 3a).

Defendant timely applied for leave to appeal to the Michigan Supreme Court arguing that the Court of Appeals erred in reversing the trial judge and that at minimum, these

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[2]App. 23a-24a.

[3]Under Michigan law, a criminal defendant can avoid the "cause" requirements of Mich. Ct. R. 6.508(D)(3) by showing that the case involved a jurisdictional defect. In the state courts, Mr. Marable argued that such an error existed as an alternative basis for release.

proceedings should be remanded so that the unaddressed issue of "cause" could be addressed.

While this appeal was pending, the Michigan Supreme Court handed down its ruling in *People v. Reed*, 449 Mich. 375, 535 N.W.2d 496 (1995). In that ruling, the Court held that counsel did not have a duty to raise all issues of arguable merit even where requested relying on this Court's ruling in *Jones v. Barnes*, 463 U.S. 745 (1983). The Court further declined to adopt the "significant and obvious" limitation on the *Jones* doctrine recognized by several federal courts and the separate opinion in *Reed*.[4] The Court found that for Sixth Amendment purposes, appellate strategy is presumed in issue abandonment cases, and that there was no requirement that the court look at whether counsel actually considered, or indeed was even aware of the abandoned issue.[5] In other words, the Court found that the inquiry into whether an issue abandonment was the product of sound appellate strategy was a hypothetical inquiry into whether a hypothetical practitioner could have made the decision to abandon the issue in question, not whether counsel in the given case actually made such an inquiry.

On November 29, 1995, the Michigan Supreme Court denied leave to appeal finding that "the application for leave to appeal is considered, and it is DENIED, because we are not

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[4]*See Grey v. Greer*, 800 F.2d 644 (7th Cir. 1985); *Reed*, 449 Mich. At 402, 535 N.W.2d at 509 (Cavanagh, J. concurring in part, dissenting in part).

[5]In so ruling, the Court rejected the Michigan Court of Appeals ruling which held that an evidentiary hearing was ordinarily required to determine whether the decision was the product of appellate strategy. *People v. Reed*, 198 Mich. App. 639, 499 N.W.2d 441 (1993).

persuaded that the question presented should be reviewed by this Court." (App. 2a).

Petitioner applied for rehearing in the Michigan Supreme Court arguing that Mr. Marable met the standards of *Reed* and that at minimum this case should be remanded for full consideration of his ineffective assistance of counsel claim[6]. In support of this, the Petitioner provided the affidavit of an expert witness who opined that the sentencing departure argument was well known in Michigan law at the time, that the argument would not have conflicted with the arguments which were raised by appellate counsel, and that there was no plausible reason for this argument not being raised on the initial appeal. This witness was an appellate attorney who handled over 800 criminal appeal including a substantial number of drug appeals, (App. 30a, ¶4). Counsel also provided the Court with an affidavit from the Petitioner indicating that he had requested his appellate attorney to raise the departure issue. Counsel informed the Petitioner that the issue was best raised at a later date . The Petitioner clearly and unequivocally stated that he never intended to abandon the issue and would not have concurred in such an abandonment if he had been correctly advised, (App. 32-33a). This motion was denied without comment by the Michigan Supreme Court on February 23, 1996, (App. 1a).

This Petition follows.

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[6]Under Michigan law, the question of whether to grant rehearing is left to the discretion of the judge. *See, e.g. Smith v. Sinai Hosp.*, 152 Mich. App. 716, 722-23, 394 N.W.2d (1986). Under Michigan practice, a court has the discretion to entertain new issues on rehearing if the Court believes that the interest of justice so require. *Theophelis v. Lansing General Hosp.*, 148 Mich. App. 564, 384 N.W.2d 823 (1986).

REASONS FOR GRANTING WRIT

Petitioner urges this Court to grant *certiorari* to determine whether the Michigan courts are misconstruing this Court's holdings interpreting the guarantee of the right to the effective assistance of appellate counsel. The Michigan courts have taken the position that the determination of what issues should be presented on appeal is left solely to the discretion of the appointed attorney and that a criminal defendant may not rebut the presumption of competence by showing that the unraised issue was significant or obvious, that the criminal defendant actually requested the issue to be raised, or that in the given case the issue withholding was not the product of informed appellate strategy. By holding that the Court will afford a high measure of deference to *hypothetical* appellate strategy, the Michigan courts have raised the presumption of competent representation to the level of a conclusive presumption and have in the process stripped a criminal defendant of the protection of the guarantee. Petitioner urges this Court to grant certiorari with an eye towards reversal of this view.

I. THE MICHIGAN APPELLATE COURTS ERRED IN HOLDING THAT APPELLATE ATTORNEYS DO NOT HAVE A DUTY TO RAISE SIGNIFICANT AND OBVIOUS ISSUES ON APPEAL, PARTICULARLY WHERE THE DEFENDANT REQUESTS THAT THESE ISSUES BE RAISED.

In order to reopen a criminal conviction in the State of Michigan, a prisoner's sole remedy is to file a petition for post-judgment relief under Mich. Ct. R. 6.500 *et seq.* In order to demonstrate entitlement for relief under this rule, the prisoner must demonstrate "good cause" for the procedural

default and "actual prejudice." These concepts were borrowed this Court's case law interpreting the federal habeas corpus statute. In *People v. Reed*, the Court held that where a criminal defendant relies on an error of counsel to meet the "good cause" requirement, the proponent must demonstrate a violation of his/her Sixth Amendment right to effective assistance of appellate counsel in order to prevail.[7]

Interpreting this Sixth Amendment right,[8] the Michigan Supreme Court held that counsel's decisions regarding which issues should be raised on appeal are left to the sole discretion of counsel and that counsel can refuse to raise significant and obvious issues even in the face of a Defendant's request to raise the issues. The Supreme Court further overruled the portion of the Court of Appeals ruling in *Reed* which held that a criminal defendant should ordinarily be afforded an opportunity to demonstrate that counsel's issue withholding was not the product of informed lawyering.

In *Kimmelman v. Morrison*, 477 U.S. 365 (1986), this Court found that failure of an attorney to pursue a Fourth Amendment violation claim on appeal could be reviewed in federal habeas corpus proceedings, *even though federal courts will normally refuse to hear habeas corpus cases involving search and seizure questions*. Under *Kimmelman*, a Defendant must prove that counsel's failure to raise a Fourth Amendment

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[7]Relying on this Court's ruling in *Murray v. Carrier*, 477 U.S. 478 (1986), the Court refused to find that errors of counsel less than ineffective assistance of counsel would constitute "cause" for purposes of Mich. Ct. R. 6.508. 449 Mich. at 380.

[8]The Michigan Supreme Court previously held in *People v. Pickens*, 446 Mich. 298, 521 N.W.2d 797 (1994), that Michigan does not apply a higher state standard in determining whether counsel was ineffective.

claim was not based on strategic considerations and further that had the motion been granted a different result was likely.

In *Kimmelman*, the Court explicitly rejected the State's argument that counsel's failure to challenge the validity of the seizure of evidence was based on strategy, where the record showed that counsel was unaware that the Government was going to introduce the evidence, and this unawareness was predicated on counsel's failure to engage in adequate pretrial discovery:

> The trial record in this case clearly reveals that Morrison's attorney failed to file a timely suppression motion, not due to strategic consideration but because, until the day of trial, he was unaware of the search and of the State's intention to introduce the bed sheet into evidence. Counsel was unappriased of the search and seizure because he had conducted no pretrial discovery. Counsel's failure to request discovery again, was not based on "strategy," but on counsel's mistaken belief that, the state was obliged to take the initiative and turn all over all of its inculpatory evidence to the defense and that the victim's preference would determine whether the State proceeded to trial after an indictment had been returned.
>
> Viewing counsel's failure to conduct any discovery from his perspective at the time he decided to forgo that stage of pretrial preparation and applying a "heavy measure of deference," ibid., to his judgment, we find counsel's decision unreasonable, that is, contrary to prevailing professional norms.

477 U.S. at 385. The Court further found that counsel's ignorance of the applicable law further justified this result:

> The justifications Morrison's attorney offered for his omission betray a startling ignorance of the law--or a weak attempt to shift blame for inadequate preparation. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Respondent's lawyer neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery. Such a complete lack of pretrial preparation puts at risk both the defendant's right to an " 'ample opportunity to meet the case of the prosecution,' " and the reliability of the adversarial testing process.

(Citations omitted).

Similarly, in this case, there is no showing that counsel's trading in of properly preserved issues for procedurally defaulted issues is professionally reasonable appellate strategy. While *Jones* allows an appellate attorney to withhold issues, this decision must be done as part of the exercise of "sound professional judgment of counsel." *Haskins v. Lecureux*, 16 F.3d 1219, 1219 (6th Cir. 1994). In reaching this decision, the reviewing court must look at the issues raised and the issues waived. *Ellis v. Lynaugh*, 873 F.2d 830 (5th Cir. 1989). Here the issues would not have conflicted with each other. Further, the issues presented were for the most part procedurally defaulted, and the rejected issue was properly preserved. *Jones v. Barnes*, 463 U.S. 745 (1983), does not allow counsel to refuse to raise significant and obvious issues. *See Gray v. Greer*, 800 F.2d 644 (7th Cir.

1986); *Kurina v. Thieret*, 853 F.2d 1409, 1417 (7th Cir. 1988).[9]

Ignorance of the law is not informed lawyering entitled to this deference. *Kimmelman v. Morrison*, 744 U.S. 365 (1986); *Gray v. Lynn*, 6 F.3d 265, 268-69 (5th Cir. 1993). There are numerous federal cases where appellate counsel has been found ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to "raise significant and obvious legal issues without any "conceivable tactical or strategic reason." II J. Liebman, *Federal Habeas Corpus Practice and Procedure*, §26.3b, p. 862-63 (1994).[10]

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[9]Similarly, numerous appellate courts have declined to uphold every dereliction of trial counsel by sweeping it under the "trial strategy" umbrella. These courts correctly recognize that basic investigation is a prerequisite to the exercising of sound trial strategy. Where such investigation is not done, these courts have declined to grant counsel's decision the high measure of deference ordinarily afforded to appellate counsel. *United States v. Barbour*, 259 U.S. App. DC 111, 813 F.2d 1232, 1234 (1987) ("Only when reasonable investigation has been performed is counsel in a position to make informed tactical decisions. It is especially important counsel adequately investigate the case in order that at the very least he can provide minimally competent professional representation"); *Neally v. Cabana*, 764 F.2d 1173, 1178 (5th Cir. 1985); *House v. Balkcom*, 725 F.2d 608, 617-618 (11th Cir. 1984); *Crisp v. Ducksworth*, 743 F.2d 580, 583 (7th Cir. 1983).

[10]*See, e.g. United States v. DeLaFuente*, 8 F.3d 1333, 1336-37 (9th Cir. 1993); *Ratliff v. United States*, 999 F.2d 1023, 1026 (6th Cir. 1993) (counsel's failure to appeal erroneous restitution award was appellate ineffective assistance of counsel); *Dawan v. Lockhart*, 980 F.2d 470, 473-74 (8th Cir. 1992) (trial counsel should have challenged his own conflict of interest in post-trial motion and on appeal, and failure to do so was "cause" to justify raising issue in habeas action); *Freeman v. Lane*, 962 F.2d 1252, 1257-58 (7th Cir. 1992) (counsel's failure to raise 5th Amendment claim on appeal despite ample precedent for claim

(continued...)

These principles should apply with greater force here, where the Petitioner specifically requested counsel to raise the issue. The refusal of appellate counsel to raise a non-frivolous claim on direct appeal which the client wanted to raise should be evaluated by ineffective assistance of counsel standards. *See, e.g. Smith v. South Carolina*, 882 F.2d 895, 898 (4th Cir. 1989) *cert. denied* 493 US 1046 (1990).[11] In *Clay v.*

(...continued)
was ineffective assistance rising to the level of "cause"); *Hollis v. Davis*, 941 F.2d 1471, 1477-78 (11th Cir. 1991), *cert denied* 111 S Ct 698 (1991) (trial counsel's failure to challenge racially discriminatory jury selection practice because of his unfamiliarity with equal protection law constitutes ineffective assistance of counsel and "cause" to avoid procedural default); *Rodriguez v. Young*, 906 F.2d 1153, 1161 (7th Cir. 1990), *cert denied* 111 S Ct 698 (1991) (counsel's decision to forego motion was not part of sound trial strategy or reasonable exercise of processional judgment, thereby amounting to "cause" to permit habeas review in post-conviction proceeding); *Orazio v Dugger*, 876 F.2d 1508 (11th Cir. 1989) (counsel ineffective in failing to challenge trial court's denial of the defendant's request for self-representation at trial level); *Matire v. Wainwright*, 811 F.2d 1430 (11th Cir. 1987) (appellate counsel was ineffective in failing to challenge a "blatant Fifth Amendment violation"). *See also Houston v. Lockhart*, 982 F.2d 1246 (8th Cir. 1993) (remanding case for an evidentiary hearing to determine whether there was a significant non-record issue and whether counsel erred in failing to raise it).

[11]Counsel's erroneous advise that the matter was best raised in post-conviction proceedings demonstrated that the attorney's decision was not professionally reasonable. As this very action demonstrates ordinarily these issues cannot be raised in post-conviction proceedings. This issue could have been determined with only cursory research.

Under *Strickland* appellate counsel has a duty to investigate a criminal defendant's file as a prerequisite to exercising sound appellate strategy. Failure to conduct such investigation is not entitled to deference. *Orazio v Dugger*, 876 F.2d 1505, 1513 Cir. 1989). *See also* n. __ and the
(continued...)

Director, 749 F.2d 427, 430-32 (7th Cir. 1984), *cert. denied* 471 U.S. 1108 (1985), the Court held that appellate counsel's failure to perfect an appeal where the client indicated a desire to appeal provided sufficient cause under *Wainwright v. Sykes*, 433 U.S. 72 (1977) to avoid the default of waived issues. These cases rest firmly in the idea that the "the attorney's refusal to comply with the client's reasonable wish to raise a particular claim breaches the agency relationship between attorney and client, thereby making it unreasonable to impose upon the client the consequences of the attorney's procedural default." II J. Liebman, *Federal Habeas Corpus Practice and Procedure* §26.3b n.39 (citing Restatement (Second) of Agency, §385(1958)).

This agency law analysis was embraced by this Court in its opinion in *Coleman v. Thompson*, 501 U.S. 772, 753-54 (1991). While *Jones v. Barnes*, 463 U.S. 745 (1983) allows an appellate attorney (for purposes of federal constitutional law) to withhold issues, this decision must be done as part of the exercise of sound professional judgment of counsel and not in defiance of the defendant's pleas to raise valid and substantial issues. This is particularly true where substitute counsel could have still been retained or a *pro se* supplemental brief raising this issue could have been filed and was not out of reliance on counsel's bad advise. *See* Mich. S. Ct. Admin. Order 1981-7, §4, Std.11.[12] Affidavits have been presented

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[11](...continued)
cases cited therein.

[12]Note that in *Jones v. Barnes* the prisoner had filed a supplemental brief with the New York courts raising the issues counsel refused to raise. Mr. Marable's affidavit (submitted below) expressly indicates that he would have sought substitute counsel to raise the issue. App. 32a, ¶6.

below demonstrating this and the professional unreasonableness of counsel's decision.[13]

It should be noted that the Defendant in *Jones v. Barnes*, did not press the agency theory and in fact waived claims of his counsel's ineffective assistance of counsel. 463 U.S. at 754 n.7. Similarly, *Murray v. Carrier*, 477 U.S. 478 (1986) *did not even involve an ineffective assistance of counsel claim*. 474 U.S. at 484.[14] The question presented in *Murray* was whether there could be cause in attorney error

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[13]For cases holding that counsel has a constitutional duty to provide accurate advise to his client, *see Risher v. United States*, 992 F.2d 982 (9th Cir. 1993); *Garmon v. Lockhart*, 938 F.2d 120 (8th Cir. 1991); *United States v. Loughery*, 908 F.2d 1014 (D.C. Cir. 1990); *Hill v. Lockhart*, 877 F.2d 698 (8th Cir. 1989), *rehearing granted and aff'd*, 894 F.2d 1009, *cert. denied*, 497 U.S. 1011 (1990). In *Loughery*, the Defendant pled guilty based on the advise of an attorney who had failed to become aware of a recent Supreme Court decision which provided a basis for dismissing many of the counts against her, and counsel's failure to advise the defendant of the decisions effect. Despite the defendant's inquiries to her attorney regarding this case and her expressed reluctance to plead guilty, her counsel continued to advise her to enter the plea.

The Court found that this failure was both unreasonable conduct and prejudicial to the defendant. Counsel's failure to learn of and apprise the defendant of the case fell below a reasonable standard of attorney conduct because "criminal defense attorneys practicing in federal courts are expected to keep abreast of the Supreme Court's decisions affecting their client's interest." *Id.* at 1018. The court stated that this was not an instance of reasonable trial strategy that proved ill-advised in hindsight. Instead, counsel's conduct "evinces an abdication of his responsibility to his client, and it is such case that courts most typically find that counsel's performance was below the requisite level of competence." *Id.* at 1019.

[14]The Michigan Supreme Court's lead opinion in *Reed* erroneously treated *Murray* as an ineffective assistance of counsel case. 449 Mich. at 384. *Cf* 449 Mich. at 414 (Levin, J. dissenting) (also noting the analytical flaw in the majority's opinion).

which was less than ineffective assistance of counsel. 477 U.S. at 484. The Court found that there could not be.[15] This is what these decisions stand for. The decisions are not precedent for issues which could have been raised and were not. As this Court has noted: "It is a maxim, not to be disregarded, that general expressions in every opinion, are to be taken in connection with the case in which those expressions are used." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 460 (1978) (quoting *Cohens v. Virginia*, 6 Wheat 264, 399 (1821)). *See also Landgraf v. United States*, ___ U.S. ___, 114 S Ct. 1483, 1497 (1994); *Jean v. Nelson*, 472 U.S. 846, 873 (1985). Because Mr. Marable requested counsel to raise this issue and counsel rejected the issue based on a fundamental misunderstanding of Michigan post-conviction procedures, Mr. Marable was denied his right to effective assistance of counsel on his first appeal. Consequently, he has established that cause exists for his failure to raise the issue in his first appeal.

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[15]Indeed, the *Murray* Court, in part, declined to adopt the proposed cause exception, finding that the more egregious errors could be redressed through ineffective assistance of counsel claims. 477 U.S. at 496.

RELIEF REQUESTED

For all of the reasons stated above, Petitioners request this Court issue a writ of certiorari or alternatively remand this matter for further proceedings.

Respectfully submitted,

SUZANNE CAROL SCHUELKE*
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APPENDICES

Order Denying Rehearing (Second Appeal)

Order

Entered: February 23, 1996

Michigan Supreme Court
Lansing, Michigan

James H. Brickley
Chief Justice

102711-2

Charles L. Levin
Michael F. Cavanagh
Patricia Boyle
Dorothy Comstock Riley
Conrad Mallet
Elizabeth A. Weaver
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 94503
COA: 131150

ALONZO MARABLE,
Defendant-Appellant.

LC: 90-003979

On order of the Court, the motion for reconsideration of this Court's order of November 29, 1995, is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

I CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

SEAL

/s/Corbin R. Davis

February 23, 1996

Supreme Court Order Denying Leave to Appeal
(Second Appeal)

Order

Entered: November 29,1995

Michigan Supreme Court
Lansing, Michigan

James H. Brickley
Chief Justice

102711-2

Charles L. Levin
Michael F. Cavanagh
Patricia Boyle
Dorothy Comstock Riley
Conrad Mallet
Elizabeth A. Weaver
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 94503
COA: 131150

ALONZO MARABLE,
Defendant-Appellant.

LC: 90-003979

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED because we are not persuaded that the questions presented should be reviewed by this Court.

I CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

SEAL

/s/Corbin R. Davis

November 29, 1995

Court of Appeals Order (Second Appeal)
In the Michigan Court of Appeals
ORDER

People v Alonzo Marable

Docket #170120 & 170604

LC #90-3979

Martin M. Doctoroff
Presiding Judge

Maura D. Corrigan

Thomas G. Kavanagh

Judges

Pursuant to MCR 7.214(E) (as to Docket No. 170120 only), and MCR 7.216(A)(7), the Court dispenses with oral argument, VACATES the Recorder's Court for the City of Detroit's order granting defendant's motion for relief from judgment and resulting new sentence, and REINSTATES defendant's original sentence. Defendant failed to establish either good cause for failing to raise his challenge to the sentence on prior appeal of right, No. 131150, or that the sentence originally imposed was in any way invalid. MCR 6.508(D)(3)(a) and (b) (iv). *People v Carpentier*, 446 Mich 19, 27, (1994). At the original sentencing, the trial court rejected defendant's relatively young age as a basis for departure – although it might have ruled otherwise, *People v Harvey*, 203 Mich App 445 (1994) – at least partly in light of the fact that defendant had a previous involvement with cocaine which, although not constituting a conviction, nonetheless represented criminal activity. *People v Chesebro*, 206 Mich App 468, 473-474 (1994). Given the circumstances of the offense, including defendant's claim to the undercover officer that he could supply quantities of cocaine as large as a kilogram with merely 30 notice, in denying defendant's

request for a departure sentence the original sentencing judge did not impose an invalid sentence.

This Court retains no further jurisdiction.

A true copy entered and certified by Ella Williams, Chief Clerk, on 3/27/95.

/s/Ella Williams Chief Clerk

Order Denying Leave to Appeal (First Appeal)

Order

Michigan Supreme Court
Lansing, Michigan

Entered: December 9, 1995

Michael Cavanagh
Chief Justice

94503

Charles L. Levin
James H. Brickley
Patricia Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad Mallet
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 94503
COA: 131150

ALONZO MARABLE,
Defendant-Appellant.

LC: 90-003979

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED because we are not persuaded that the questions presented should be reviewed by this Court.

I CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

SEAL

/s/Corbin R. Davis

December 9, 1995

Court of Appeals Opinion (First Appeal)

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 131150

ALONZO MARABLE,

Defendant-Appellant.

Before: Murphy, PJ, and Neff, and JR McDonald,* JJ

Defendant was convicted by a Detroit Recorder's Court jury of delivering between 225 and 649 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and was sentenced to a term of twenty to thirty years of imprisonment. He now appeals as of right. We affirm. This case has been decided without oral argument pursuant to MCR 7.214(E)(1)(b).

Contrary to what defendant asserts, defense could was allowed to cross-examine a prosecution witness as to the terms of the plea agreement she received from the prosecution in exchange for her testimony. *People v Mumford*, 183 Mich App 149, 151, 455 NW2d 51 (1990). Further, no evidence was ever submitted on the penalty difference between the offense of which the witness was originally charged and that of which she was to plead guilty. Therefore, the court properly prohibited counsel from speculating on any differences during closing argument. *See People v Longaria*, 333 Mich 696, 53 NW2d 685 (1972).

Defendant's failure to object to the jury instruction on the burden of proof waives error unless a miscarriage of justice would result. *People v Clark*, 172 Mich App 407, 417, 432 NW2d 726 (1988). Here, the jury was properly instructed with CJI2d 3.2, so there was no miscarriage of justice.

Next, defendant was not denied a fair trial because of bias by the trial judge in favor of the prosecution. Defendant cannot complain of two incidents which occurred before trial because he never moved to disqualify the judge. *People v Mixon*, 170 Mich App 508, 514, 429 NW2d 197 (1988). Of the three-trial related incidents, two involved comments made outside the presence of the jury and so did not deny defendant a fair trial. *Id.*; *People v Pointer*, 133 Mich App 313, 317, 349 NW2d 174 (1984). The third incident involved comments that were not of such a nature as to unduly influence the jury. *See People v Burgess*, 153 Mich App 715, 719, 396 NW2d 814 (1986).

Defendant's challenge to the prosecutor's introduction of certain testimony at trial has been waived because he failed to object below and because the testimony did not result in manifest injustice. *People v Standifer*, 425 Mich 543, 557, 390 NW2d 632 (1986).

Defendant was not denied a fair trial due to alleged prosecutorial misconduct. *People v Foster*, 175 Mich App 311, 317, 437 NW2d 395 (1989). The prosecutor's remarks constituted proper commentary on the evidence presented. *See People v Davis*, 57 Mich App 505, 513, 226 NW2d 540 (1975).

Finally, defendant was not denied the effective assistance of counsel. *People v Tommolino*, 187 Mich App 14, 17, 466 NW2d 315 (1991).

Affirmed.

/s/William B. Murphy
/s/Janet T. Neff
/s/Joseph R. McDonald

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*Former circuit judge, sitting on the Court of Appeals by assignment.

Motion for Relief from Judgment Transcript

Detroit, Michigan

Friday, October 29, 1993

THE CLERK: File 90-3979, Alonzo Marable. The defendant is here on a motion for relief from judgment.

MR. TUCKER: Good morning, Your Honor. Clarence Tucker on behalf of the defendant, Alonzo Marable.

THE COURT: Good morning.

MS. BREEN: Good morning, Your Honor. Carolyn Breen on behalf of the Wayne County Prosecutor's Office.

THE COURT: Good morning.

MS. BREEN: Your Honor, before arguments start, if we could – if I could just find out where we are. I received an order from the court ordering me to appear to argue at today's hearing. Under the court rules, and I guess this is what I'm trying to find out where we are, under the Court Rules MCR 6.504(b), the court initially considers the motion for relief from judgment. If you do not summarily dismiss, then it is required that the prosecutor file a response in writing. I guess I have not received an order to file anything in writing so we are we at this initial purpose because under the court rule the People are allowed and are required to file a response in writing if you do not summarily dismiss the matter.

THE COURT: What did I do?

MS. BREEN: You ordered me to appear ordering an APA from the appellate section to argue motion for relief from judgment in answer to attorney's motion on 10-29-93, and I did come down earlier in the week to see from your clerk if I wee, you know, to answer it in writing and I was told no, that it was to tell me to come down and argue. I didn't get a

chance to speak to the court. You were on the bench at the time.

THE COURT: I wish you had because I am going to rule today and anticipated that you would, you know -- I'm sorry. I mean -

MS. BREEN: See, you know, I was under the assumption that it was just arguing the matter to either -- because we truly believe that we have and we are required to respond if you do not summarily dismiss, and my understanding from the order itself was nothing in writing.

THE COURT: I don't need anything in writing if you're prepared to

MS. BREEN: Well, that's the point, that we do want to put it in writing and that the rule requires it to be filed.

THE COURT: Yeah, it does. Again, I don't know what – I want to rule on this today, Miss Breen. I really wish you had spoken with me because I, of course, know that the court rule requires you to respond in writing.

MS. BREEN: Your Honor, I can have something prepared in a week even if the court wants because I'm outlining it in it in my mind. I do not believe that they have shown cause or prejudice in this matter and I will prepare something for a week if the court wants it in writing but -

MR. TUCKER: Your Honor, may we approach the bench?

THE COURT: Yes.

(Whereupon a brief discussion was held off the record).

THE COURT: All right. Based on the off the record discussion, what we have decided is just based on the lack of understanding as to what was expected today, we're going to

proceed with the defense argument and we will continue the matter for Friday for the People's response at which time the court will rule on the matter. I think that's a happy medium. We apologize for any lack of clarity.

MS. BREEN: I apologize also, Your Honor.

THE COURT: But really, you know, for future purposes, especially with regard to the motion for relief from judgment, again, I certainly understand how that could easily be misconstrued. The court wants in writing the -- consistent with the court rule, in writing the response. Again, the court wanted to rule on this matter today and have closure on it, but at any rate, we will do it in that manner. We will hear defense argument today, the People will respond on the -- next week Friday and the court will decide on next week Friday.

MR. TUCKER: Thank you. Your Honor, defense, as an opening statement, would rely, as a whole, on its brief that was filed with the court. As the court knows, we came in under MCR 2.6502 and the paragraphs related thereto.

It is our position, Your Honor, that the sentence which was imposed in this matter by Judge Talbot was an invalid sentence and it was invalid based on the fact that the court had refused and failed to exercise its discretion with respect to deviation from the minimum sentence. As a matter a of fact, we contend that the court at that time was laboring under a -- not only did it fail to exercise its discretion but it was laboring under a misconception about the objective criteria that the court could rely on to deviate from a sentence.

The court, as we quoted in our brief, noted that Mr. Marable was of a young age. He was, quote, in the court's words, only 23 years old, but the court construed that age factor to be a subjective criteria when it's clear to us that, in fact, was an objective criteria.

In that context, the court then refused and did not consider any of the other individualized sentencing characteristics which the court should and could have taken into consideration at that time. Based on that, it then failed to impose the individualized characteristics of sentencing which the State of Michigan has been known for and the law is replete in that requirement even in the context of the sentencing guidelines.

With respect to Mr. Marable, my client has met several of the objective and measurable criteria which would have permitted the court to consider a deviation from the minimum sentence. One of the most important factors in Michigan through -- the Court of Appeals and the Michigan Supreme Court has labored with this issue through *People v Downey, People v Hill* and other related cases where the court has looked at what the rest of the country has done and one -- some of the criteria that has come through repeatedly and very clearly is the factor of age. In this case my client's 23 years old. No prior record. This, in effect, was my client's first contact of any significance with the criminal justice system. As well as a work history. My client had an outstanding work history. And, of course, there are other factors which some of the court have at least made reference to, such as strong family support. My client was married at the time. His wife and his daughter are here.

And, of course, as the court knows, when it came to *People v Hill*, which was a case that created -- wee the first case under the Court of Appeals where they, in fact, utilized a panel to try to thrash through this concept of deviation from the minimum sentencing, and in that context the *Hill* court indicated Very clearly that not only can the court take in consideration the pre-arrest factors that are objective, it can also take into consideration those post-arrest criteria which

bode well in behalf or contrary to the client being considered for a deviation from the minimum.

In this context, Mr. Marable has demonstrated what could only be described as an outstanding post-arrest conduct. He has not received any major or minor misconducts during his entire tenure in the prison system. The NAACP has awarded the him a Certificate of Meritorious Service. He has acquired significant college credits both at Jackson Community College, Wayne Community College. He has participated in the Prison Fellowship Merit Seminar. He is a part of I think 20 inmates who are part of the warden, I think, if I characterize it correctly, in effect, dispute resolution team. He has received -- and I have documentation which I could submit to show to the court, I think the court has much of it, but he has received numerous citations from the prison, 178, including the Ryan Correctional System where repeatedly he is considered a person who is willing to participate, who is excellent in working with others, who gets along and shows strong feelings towards God and to help the children of our future. And he has been, time and time again, selected by the prisoner as -- by the prison as an inmate who has demonstrated leadership qualities, rehabilitative qualities, and in that context they have appointed him to these various committees.

As a matter of fact, Your Honor, on August 25th, 1993 Mr. Marable participated in a fairly extensive radio talk show interview in which one of the call-ins who happened -- in fact, was Judge Michael Talbot. Mr. -- Judge Talbot's comment on the air was that he -

MS. BREEN: I'm going to object. This is hearsay at this point in time, this is very much hearsay.

THE COURT: Wait.

MR. TUCKER: Your Honor, we would offer it by way of an offer of proof at this time. We have a document that at least verifies that the radio talk show took place, but at the same time I'm not going to belabor the point at this time but we would offer it by way of an offer of proof.

THE COURT: And what is your objection, hearsay?

MS. BREEN: Whatever was said on the radio talk show is purely hearsay. The fact that the radio talk show took place, fine, I have no problem with that, that's probably public record someplace, but what was said on the radio show is hearsay evidence.

MR. TUCKER: Your Honor, I'm not offering it for the truth of the matter asserted. I'm offering it for the fact that the radio talk show did occur and that Mr. Marable was selected to participate in that talk show and that it dealt with matters concerning the rehabilitation and a discussion of the entire concept of sentencing in the State of Michigan.

THE COURT: I will allow it for that purpose and overrule the objection.

MS. BREEN: Thank you.

MR. TUCKER: Thank you, Your Honor.

THE COURT: Continue, Counsel.

MR. TUCKER: Okay. Your Honor, so when we -- when the court -- we would ask the court then, in light of *People v Downey, People v Hill*, in light of *Jenkins v Recorder's Court* which gives this court the power to consider resentencing an inmate who, in fact, meets the objective criteria, both pre-arrest and post-arrest, where the court finds that there was an invalid sentence, we contend that, in fact, it was an invalid sentence. And we would also contend, Your Honor, that the judge displayed a certain animus towards Mr.

Marable which we believe was inappropriate and that played a factor in the judge not considering the deviation from the minimum sentence.

For all of those reasons, Your Honor, and for Mr. Marable's outstanding record, age, his work history, his very limited contact with the criminal justice system and, to some extent, his role even in the offense in which he was convicted where he was not the, quote, the initiator, the contact there was initiated by others, an undercover agent that took some time for it to come about -- of course, we're highlighting that only to say that whatever weight the court will give to that factor but he was not in that context initiator. So for all of those regains, we would ask the court to consider resentencing Mr. Marable. Thank you.

THE COURT: Thank you, Mr. Tucker.

The court would just note -- again, we are going to continue this matter for -- to allow the People time to respond in writing and to do oral argument on next week Friday.

The court would like to note that it has received numerous, numerous letters on behalf of Mr. Marable and the court has read each and every one of them and the court thanks the writers, the authors for their participation and input in this matter as well. Mr. Marable' we're sorry that we can't have closure on this matter this morning. We are going to continue this matter to next Friday at which time we would hope any -- absent unforeseen circumstances, that we could rule at that time.

I assume that many of the people here in the audience today are here on behalf of Mr. Marable. Would you have the people that are here for him -- I would like to see -

MR. TUCKER: His wife, family members.

THE COURT: Again, the court wants to let just each of you know that we will not be ruling this morning, ladies and gentlemen. We will resume this matter on next week Friday at 9:00 a.m.

MR. TUCKER: Thank you, Your Honor.

THE COURT: Thank you, Mr. Tucker. Thank you, Hiss Breen.

MS. BREEN: Thank you, Your Honor.

THE COURT: We'll see you at that time.

(Proceedings concluded)

Motion for Relief from Judgment (Continued)

Detroit, Michigan
Friday, November 5, 1993

– –

THE CLERK: File 90-3979, Alonzo Marable. Mr. Marable is here on a motion for relief from judgment.

MS. BREEN: Good morning, Your Honor. Carolyn Breen from the Wayne County Prosecutors Office.

MR. TUCKER: Good morning, Your Honor. Clarence Tucker on behalf of the defendant, Mr. Marable.

THE COURT: Good morning to you both.

This matter wee continued from last week. We heard arguments on behalf of the defense and matter was continued to today for purposes of submission of the prosecutor's brief and oral argument. Are we ready to proceed?

MS. BREEN: Yes, Your Honor.

THE COURT: You may proceed.

MS. BREEN: Your Honor, first of all, I understand counsel did not receive his copy. I was off yesterday due to a funeral in the family but I have supplied counsel with a copy this morning. It was mailed to him and I apologize it did not get there.

THE COURT: That is all right.

MS. BREEN: Your Honor, basically the People will stand on the brief submitted to the court but I would like to just summarize a couple of things .

First of all, the test under a motion for relief from judgment is – there's a two-prong part to this. First there meat be a showing of good cause why these issues were not raised

on appeal. There has been no showing of good cause, and I think even the case law, *People v. Reed*, which is cited in the brief, indicates that you cannot without more -based on this record, there's nothing to show ineffective assistance of appellate counsel. There were five issues raised before the Court of Appeals. The Court of Appeals affirmed. There were five issues raised before the Michigan Supreme Court. The Michigan Supreme Court denied -- denied the application for leave to appeal. So we must look at these things. Counsel on appeal raised the issues that were appropriate in that case, and I think this court is well aware that all issues do not have to be raised on non-frivolous issues, counsel has to pick through, and in this case five very substantial issues were raised and litigated in the Court of Appeals and presented to the Michigan Supreme Court. So defendant fails on the first part of the test, no cause has been shown.

The second part is if good cause is shown, also prejudice, actual prejudice must be shown. Actual prejudice in the sentencing issue means that the sentence is invalid. Now, we recognize that the record indicates the sentencing court stated on the record that age was subjective, that 'e there. But we have to first look at the statute the court was sentencing under. The court was sentencing under MCLA 333.74012(a)(2), which is the drug -- it we. a drug case. It requires a mandatory minimum. The court may deviate if it finds substantial and compelling reasons. In *People vs. Poppa*, 193 Mich. App. 184, it is clear the Court of Appeals said we have to look at -- you have to look at substantial and compelling reasons, but what's happening, this I. a mandatory minimum first. The court may depart if it finds substantial and compelling reasons which are objective and verifiable. It doesn't have to look at those.

Judge Talbot did look at age, even though he said it's subjective. If you read through the transcript, he was looking

at it in an objective factor -- fashion. He said 23 is subjective. So what that he's 23? So what that he has a family? What he was looking at of more importance was the fact that Mr. Marable -- and he said I'm not looking at this as conviction but he's looking at it as behavior of the defendant. He had a prior 7411 drug probation and he said just six months later the defendant is back before me able to deliver a quarter kilo of drugs or a substantial amount of drugs. It was over 250 grams of drugs. this very important.

Poppa was a case where the court initially -- the sentencing court initially thought the sentence in that case -- as this court knows, the mandatory minimum has gone back and forth and up and down over the past few years. At that point in time the sentencing court thought the mandatory minimum was the 20 to 30. In actuality, when the court was sentencing the defendant Poppa, it was actually 10 to 20. The court, sentencing court, when they thought it was the 20 to 30, said, well, we can find substantial and compelling reasons to deviate. When they learned that it was the 10 to 20, the lower amount, there were no substantial and compelling

The court considered reasons, they didn't state anything on the record, and the Court of Appeals said that's appropriate because the mandatory minimum is considered a valid sentence, and I think that is vital in this case. It is a valid sentence.

The court looked at other reasons to see but those were not important. The important factor to the sentencing court in this case was the behavior of Mr. Marable at the time of sentencing. He showed no remorse. And the court felt that his story at the time of trial was beyond belief and he indicated that the jury had also felt that, and the fact that those other things, family and age, were not as important.

Now, we believe that based, first of all, on the fact that no cause has been shown as to why these were not raised on appeal, this court must deny this relief to the defendant.

Secondly, we believe that the sentence is valid and we believe the case law that s before the court and case law that s out there from the Court of Appeals indicates that this is a valid sentence.

We would also note, and I didn't put this in my brief, but there s been a great deal mentioned of Mr. Marable s behavior in the prison system at this time and we think that's commendable but anyone who's in the prison system should be acting in that fashion. Now, this can be considered at a later time at resentencing. Judge Talbot had none of that information before him.

We believe that the court should at this time and we ask the court to deny the motion for relief from judgment. Thank you.

THE COURT: Thank you, Miss Breen.

Mr. Tucker, certainly I know that you have not had an extensive amount of time to review the responsive brief. However, you will be allowed at this time to respond.

MR. TUCKER: Thank you, Your Honor.

THE COURT: If you like.

MR. TUCKER: Thank you. Your Honor, first of all, the threshold basis of our request for resentencing finds itself anchored in *Jenkins* v *Recorder's Court Judge*. In that case it clearly held that the trial judge does not have to depart but the trial judge does, in fact, have a requirement to exercise its discretion and do -- and exercise that discretion without a misconception of the law. The *Jenkins* court stated very clearly that where the trial court has failed to exercise a proper

discretion based on a misconception of the law, that, in fact, makes the sentence invalid.

And that is the case that we have here with Mr. Marable. When the trial judge attempted to exercise his discretion, he exercised that discretion laboring under a misconception that age was a subjective factor as opposed to -- I mean a subjective factor as opposed to an objective factor and he left it right there. He did not then exercise his discretion to ferret out other findings on the record that would enable him to properly exercise the discretion whether to depart or not depart. *Jenkins* says that failing to do that is, in fact -- renders the sentence invalid.

That then gets us to address the issue of good cause and actual prejudice. The court MC -pursuant to MCR 6.508(d)(3)(b), actual prejudice is clear where defendant's sentence is invalid, so we believe that we are, in fact, dealing with an invalid sentence. And that, as the court knows, the legislature was -- this was a troubling issue for the legislature for the extent that the legislature went back, amended the statute to permit the trial judge to exercise discretion as a basis for departing in order to meet Michigan's longstanding individualized

It is in that context that our good cause issue finds support in that the trial lawyer raised with the trial judge Mr. Marable's factors which were objective, his age, his prior -- his lack of a prior criminal record, his work history. None of those findings were made by the trial judge because of the fact that the trial judge stopped when he said that Mr. Marable's age was a subjective factor.

In light of the legislative amendment to the statute, the fact that these issues were, in fact, raised at the trial court does not make the failure to raise these issues on appeal by the appellate counsel the non-frivolous claims that could have

been rained. In fact, this wee a very significant issue that should have been raised on appeal by appellate counsel.

And thus, using -- using the prosecutor's own case in *People v Reed*, it clearly states that failing -- that if the trial -- the appellate counsel's performance falls below an objective standard of reasonableness, if the error is sufficiently egregious and prejudicial, if the legislature saw fit to amend the statute in order to give the trial court discretion to depart and if it was raised at the trial court level and the trial court judge misconceived the law, then certainly this becomes a very significant issue on appeal when Mr. Marable's -- the extent of Mr. Marable's liberty was at stake. For that reason, we believe that Mr. Marable clearly has a right to raise this as a good cause issue on appeal based on ineffective assistance of the appellate counsel.

We have indicated to the court that there was, in fact, actual prejudice pursuant to the court rule, and we would reiterate to the court that under 333.78401(4), clearly the court has the authority to depart. Mr. Marable has presented not just one objective factor but under the most recent announcement from the Court of Appeals in *People v Shinholster*, in that case which we. up -- which was denied leave for appeal by the Michigan Supreme Court in July of 93, it found that resentencing and the departure was appropriate based on age, based on limited contact with the prior record of the defendant, based on the work history of the defendant and based on post-arrest factors.

Clearly, Mr. Marable has met several of the pre-arrest and post-arrest factors which enables this court -- and this is the only relief, this is the only court at this moment that can exercise discretion to individualize Mr. Marable's sentence based on his pre-arrest and post-arrest performance, and based on those factors, which are objective under *Downey*, we

believe that Mr. Marable, based on merit, warrants a consideration by this court for resentencing. And that resentencing should -we would ask the court if it finds that it should be resentencing, that it should be somewhere in the range of five to 20 which is consistent with what the co-defendant received in this case.

Thank you, Your Honor.

THE COURT: Thank you, both counsels. The court is ready to rule. The court -- one of the reasons we started late this morning, the court took extensive amount of time and rereviewed all of the materials that was before it last week as well as the responsive brief that the court received this morning. The court read the various briefs and the supporting documents that were submitted by both the defense and the People.

Again, last week the court heard oral argument on behalf of the defendant and again argument today, but this matter was continued today for the purposes of allowing the People to submit the responsive brief and oral argument and again have the defendant respond as the defense counsel just did.

Having completed all of these matters, the court again is now ready to rule regarding the defendant, Alonzo Marable's, motion for relief from judgment wherein he requests to be *granted* a resentencing. Basically, the defendant claims that he should be resentenced because his sentence was invalid and because the sentencing judge did not consider the positive factors in his background and did not consider 0a age and the sentencing judge considered age as a subjective factor rather than an objective factor. Defendant contends 0a sentence was not an individualized sentence and it war not tailored to fit the circumstances of this particular case.

Now, this court may grant defendant's motion if, in fact, this court finds that defendant's sentence was invalid after this court looks at the entire sentence and not just one factor. Here the sentencing judge, in this court's mind, erroneously stated on the record the defendant's age was a subjective factor while clearly the law in Michigan states that the age is an objective factor. Of course, again, that was only one factor in sentencing.

This court believes that the defendants age at the time of the sentencing and his family history and his very minimal history of criminal activity could all justify -- have supported a downward departure and a finding of substantial and compelling reasons to do so. This court believes that the sentencing courts failure to consider these factors and to individually tailor the defendant's sentence, in fact, resulted in a manifest injustice to this defendant and an abuse of the sentencing court's discretion.

The trial court held -- had in its possession a very extensive pre-sentence investigation report which pointed out in the report many positive factors with regard to this defendant including the defendant's potential for rehabilitation.

This court believes that the defendant has met his burden in satisfying the criteria to, in fact, have his motion granted based on Michigan law. This court believes the defendant's sentence was indeed excessive, that there was, in fact, an invalid sentence and that there was, in fact, an abuse of discretion by the sentencing judge, and based on all of the above, the court will grant defendant's motion for relief from judgment and we will schedule this matter for resentencing.

THE CLERK: November 22nd.

MS. BREEN: What is the date, Your Honor?

THE COURT: This matter will be continued to November 22nd.

MR. TUCKER: Thank you, Your Honor.

THE COURT: Thank you. Good luck to you. Thank you, Miss Breen.

MS. BREEN: Thank you, Your Honor.

(Proceedings concluded)

Transcript of Motion for Stay of Proceedings

Detroit, Michigan

Monday, November 22, 1993

THE CLERK: This is File 90-3979, Alonzo Marable. The defendant is before the court after a motion for relief from judgment was granted. This court granted Mr. Marable a resentencing. He's before the court for that. Also the prosecution has filed a motion for a stay of proceedings. That is to be heard today also.

MS. BREEN: Good morning, Your Honor. Carolyn Breen from the Wayne County Prosecutor's Office.

MR. TUCKER: Your Honor, Clarence Tucker on behalf of the defendant, Alonzo Marable.

THE COURT: Are we ready to proceed, Miss Breen? I imagine we need to address your motion first.

MS. BREEN: Thank you, Your Honor.

MR. TUCKER: Your Honor, just as a preliminary matter, we received the motion one day last week. I don't recall which day. We did not have time -- I was in the process of pursuing a trial over in 36th District Court. We did not have the time for a written response. I can make a response.

THE COURT: All right.

MS. BREEN: Your Honor, at this time the People have indicated in their motion that we failed to file within the seven-day notice due to illness by this prosecutor, and I think the court recognizes I was sick all last week and the week before even, and there were a number of things -- we asked the court in that motion to waive the seven-day notice. We personally delivered it to counsel on Tuesday of last week so it was one day short of the seven-day notice. We would ask

the court if you would hear that motion, the motion to stay the proceedings at this time.

THE COURT: Yes.

MR. TUCKER: Thank you. Your Honor, we have filed an application for leave to appeal in the Court of Appeals. Under the court rules, in order to appeal a motion for relief from judgment, the procedure is that an application is filed. The court rule is cited in my brief to this court. We cannot say at this time when that will come through but as the court is well aware, applications are ruled on very quickly normally. It would only be a matter of weeks. At this point in time we feel that this is the proper procedure.

We would ask the court that if the Court of Appeals indicates that it was proper for this court to grant the motion for resentencing, then the resentencing would continue and there would be nothing -- or we could appeal the sentence but it would be at that point. There would be no prejudice to the defendant. Although he is here today, we recognize that -- and there are people here with him, the prejudice -- he still would be returning to the prison system because he would be serving time and he would be credited for any of the time between now and the final resentencing if the Court of Appeals should deny our application to them.

We would ask this court, based on that information, we believe that -- and as we argued before, that there was no showing of cause, good cause, why this was not raised before in the lower courts. We would ask this court, based on these facts, to stay the sentencing until the Court of Appeals rules on the application. Thank you.

THE COURT: Thank you, Miss Breen.

Mr. Tucker?

MR. TUCKER: Yes, Your Honor, just briefly, we believe the court did rule correctly based on the law. We believe that the *Jenkins v. Recorder's Court* case where it indicated that the judge, while he may not --awhile there's not a mandatory duty to find a departure, there is a duty to exercise that discretion and that discretion must be exercised in a lawful manner that is not labored under a misconception of the law which we said Judge Talbot did in this case. Therefore, this court found that the sentence was invalid.

We also had indicated to the court with respect to good cause that when this matter wee taken to the Court of Appeals, clearly appellate counsel had an obligation and a duty, particularly in light of the legislature's amendment of the statute for this very purpose where it defined factors which must be -- should be considered with respect to determining relief from judgment as we sought in this matter, and then we cited to the court additional cases that indicated that not only could the court consider those pre -- pre-arrest factors but it also could consider those post-arrest factors such as age, brief experience with the system, work history and then, of course, Mr. Marable's conduct after incarceration.

And we believe that in light of the legislature's attention to this matter and Mr. Roether's failure to address something that goes to the substantial rights of Mr. Marable, that clearly was good cause based on ineffective assistance of appellate counsel as this court, we believe, found in its hearing on this matter so that the prosecution is not making a meritorious case before the Court of Appeals.

We would also indicate to the court that the prejudice to Mr. Marable is that he has served three-and-a-half years, that there are other implications for a delay of this sentence all the way up to the point of parole, and in that sense, we would ask the court that you consider the fact what the prosecution

has asked to be done here goes to the liberty and freedom rights of Mr. Marable and those are constitutionally based rights. We believe that any delay in that would prejudice Mr. Marable in terms of his time for incarceration. This court has found that sentence was invalid and we would ask the court to proceed with the resentencing of Mr. Marable.

THE COURT: Thank you.

MS. BREEN: Brief response, if I may.

THE COURT: Brief response.

MS. BREEN: Your Honor, first this court never found that there was ineffective assistance of appellate counsel. There were five issues raised before the Court of Appeals and the Supreme Court in Michigan.

Secondly, as to defendant's liberty rights, at this point in time he is still required to serve -- the court -- there's a mandatory sentence to be imposed upon this defendant. He does not have a right at this time for freedom. He must be serving the sentence that the court imposes upon him. We believe that it will not substantially prejudice this defendant if the court stays the proceedings. Thank

you.

THE COURT: For the record, the court will note that it did not in its findings find ineffective assistance of counsel. The court for the reasons stated at the hearing, that being the court believes the sentence was invalid, found that the defendant was entitled to the relief requested. The court at this time is ready to act on this motion and the court will at this time deny the motion to stay this -- these proceedings. The court has ruled and found that this defendant should be resentenced which is what we're here for today.

[At this point, the Court resentenced the Petitioner]

Affidavit of Jeanice Dagher-Margosian

I, Jeanice Dagher-Margosian, state as follows:

1. I am a practicing attorney with a concentration in post-judgment criminal work, including criminal appeals.

2. I received my juris doctor degree from Wayne State University in 1980 and am a member of the Ohio, Michigan, and Federal bars.

3. My office is in Ann Arbor, Michigan, (Washtenaw County), but I practice regularly in many Michigan counties of both the upper and lower peninsula. I participate as a Board member and a faculty member of the Criminal Defense Attorneys Association and co-chair the amicus committee for that organization.

4. I have handled approximately 800 criminal appeals at all levels of complexity, including a significant proportion of capital offenses. Approximately 25 of the above numbers were drug cases.

5. I have reviewed Defendant's ineffective assistance of claim in this matter by reading the pleadings, the relevant portions of both trial transcripts, and by discussing the operative facts of the case with present appellate counsel. On the basis of this review, it is my opinion that the assistance rendered to Defendant in this matter by appellate counsel was ineffective and constitutionally deficient under both state and federal standards.

6. The claims Defendant has made concerning original appellate counsel's representation in the post-appellate motion for relief from judgment were and are valid. The claims which ultimately created the basis for relief under MCR 6.500 would have been recognized by a reasonably competent criminal appellate attorney after review of this case.

7. These reasons are, specifically, the Defendant's young age at the time of sentencing, a positive work history, a limited contact with the criminal justice system and post-arrest activity.

8. It is my opinion that if original appellate counsel did not recognize this issue and raise it on Defendant's behalf in the appeal of right, he was not functioning as a reasonably competent criminal appellate attorney.

9. Conversely, if appellate counsel did recognize these issues and did not raise them on appeal, he was not also functioning as a reasonably competent criminal appellate attorney observing applicable standards of practice. This is an important issue and an obvious one. It could well have made a substantial difference in the amount of time the defendant would be ordered to serve. It is far easier, and obviously far more preferable to raise such issues on direct appeal rather than s post-appellate claims.

10. There is no plausible explanation based on appellate strategy which supports not addressing this claim in the appeal of right. Accordingly, defendant was deprived of a potentially successful appellate argument on appeal for no acceptable reason.

/s/Jeanice Dagher-Margosian

Jeanice Dagher-Margosian, Affiant

Subscribed and sworn to before me this 4th day of December, 1995. /s/Gary Margosian, Notary Public My Commission Expires

Affidavit of Alonzo Marable

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Affiant ALONZO MARABLE being first duly sworn, deposes and says that:

1. I am the Defendant in this matter, I make this affidavit based on information to which I am personally competent to testify to at an evidentiary hearing governed by the Rules of Evidence.

2. I am not an attorney and was not familiar with the sentencing laws of this state.

3. In late November, or early December of 1990, I learned about the laws governing departures from presumptive sentences in this state. In early December, I asked my appellate attorney (Mr. Roether) why this issue was not raised.

3. He responded that this issue was best raised at a later date.

4. I relied on this statement in not pursuing this issue before the Court of Appeals.

5. It was not my intention to abandon this issue.

6. Had I been aware that Michigan law did not permit the procedures recommended by my attorney, I would have never concurred in this recommendation. I would have immediately sought substitute counsel to raise the issue within the context of my appeal of right.

7. It was never my intention to abandon this issue and I did not consent in its abandonment.

Declaration in Lieu of Notarization. I declare that the statements above are true to the best of my information, knowledge, and belief. MCR 2.114(2)(b).

/s/Alonzo Marable

ALONZO MARABLE

DATED: December 4, 1995

Material Which Would Have Alerted a Competent Practitioner to Substantial and Compelling Circumstances Argument

Date	*Citation*	*Significance to a Defense Argument*
1986	DiFranco v Pickard, 427 Mich 32, 398 NW2d 896 (1986)	This Court refused to engraft an objectively verifiableness component into no-fault law.
8/2/9/88	Senate Fiscal Agency Bill Analysis, SB 598,600,603	Stated that the purpose of law was to increase judicial flexibility in sentencing and to give the judiciary the ability to determine individual circumstances
1989	"Opinion and Dissent" Letter David Cahill, Legislative Assistant to Editor of State Bar Journal, 68 Mich Bar BJ 1179	Letter from Legislative Staffer Indicating that the Downey type construction of "substantial and compelling circumstances" was not an accurate reflection of legislative intent.
5/9/90	People v Downey, 183 Mich App 405, 454 NW2d 235 (1990)	(1) Minor or passive roles are grounds for departure; (2) Departure could be based on impaired capacity; (3) Departure could be based on lack of prior record; (4) Departure could be based on amenability to probation
7/20/90	Claim of Appeal Filed	

Material Which Would Have Alerted a Competent Practitioner to Substantial and Compelling Circumstances Argument

Date	*Citation*	*Significance to a Defense Argument*
9/25/90	*People v Krause*, 185 Mich App 353, 460 NW2d 900 (1990) (Griffin J. Dissenting)	Court of Appeals Judge Goes on Record Expressly Disagreeing With *Downey*
9/25/90	*People v Krause*, 185 Mich App 353, 460 NW2d 900 (1990) (Majority Opinion)	(1) Post-Arrest Conduct Can be Considered for Determination of Substantial and Compelling Circumstances; (2) Involvement in Volunteer Work is Substantial and Compelling Circumstance; (3) Work History is substantial and compelling factor; (4) Downey's factors are non-exhaustive; (5) Objective evidence of remorse (e.g. statements beyond the Defendant's protestations of remorse can be considered); (6) Determination of whether there is substantial and compelling circumstances requires an examination of the totality of circumstances
10/29/90	Defendant's Brief on Appeal Filed	
12/90	Defendant Inquired Why Substantial and Compelling Issue Was Not Raised. Counsel indicated that it could be raised at a later date.	
1/22/91	Appellee's Brief Filed	

Material Which Would Have Alerted a Competent Practitioner to Substantial and Compelling Circumstances Argument

Date	*Citation*	*Significance to a Defense Argument*
3/4/91	People v Troncoso, 187 Mich App 567, 468 NW2d 287 (1991)	*Downey* overruled. Substantial and compelling factors can be subjective. Departure may be based on: (1) Absence of record; (2) Work History; (3) Family Support; (4) Defendant's Motivation and Desire to Live a Law-Abiding Life in History.
5/14/91	People v Bates, 190 Mich App 281, 475 NW2d 392 (1991)	Departure may be based on: (1) Defendant's attending college; (2) Preparing himself to be a member of the community; (3) Family support
7/15/91	People v Hill, 190 Mich App 322, 479 NW2d 353 (1991)	Special Panel convened on *Downey/Troncoso* conflict. Amicus participation invited by the court.
11/22/91	People v Hill, 192 Mich App 102, 480 NW2d 913 (1991)	Overruled *Troncoso*, adopted modified *Downey* approach. Evidence must be objectively verifiable, but may be post-arrest. The barrier is not a "straightjacket."
4/3/92	Case submitted to panel	
6/12/92	Court of Appeals Decision filed	